

04-10299
USDC/MA
Saris, P.

MANDATE

United States Court of Appeals For the First Circuit

No. 06-2304

UNITED STATES,

Appellee,

v.

ANDRES MARTINEZ,

Defendant, Appellant.

Before

Lipez, Circuit Judge,
Stahl, Senior Circuit Judge,
and Howard, Circuit Judge.

JUDGMENT

Entered: March 2, 2007

Appellant pled guilty to two counts alleging his participation in a cocaine trafficking conspiracy. He appeals his sentence of 188 months imprisonment, the bottom of the applicable advisory guideline range, on three grounds. First, he argues that there was a violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). However, he correctly concedes that Apprendi pertains only to judge-made findings that raise a sentence above the applicable statutory maximum and does not govern calculations under the now advisory United States Sentencing Guidelines. See, e.g., United States v. Piccolo, 282 F.3d 41, 43 (1st Cir. 2002) (citing numerous cases holding Apprendi inapposite where sentence does not exceed lowest applicable statutory maximum).

Second, appellant argues that the court should not have relied upon testimony given at the trial of a co-conspirator in determining his role in the offense. The court gave the defense counsel notice that it would be relying on this testimony. Appellant neither objected nor asked for additional time to study the trial transcript. Under the circumstances, reliance on that

testimony was appropriate. See United States v. Cruz, 120 F.3d 1, 2 (1st Cir. 1997) (en banc). As appellant is aware, the presentence report, upon which the sentencing court may rely, recommended an even larger enhancement for role in the offense than that imposed.

Finally, appellant's contends that under advisory United States Sentencing Guideline § 3B1.1(b), the enhancement should not have been imposed unless there was a showing that he supervised five participants in the offense. Application note 2 makes plain that a defendant who otherwise qualifies as a supervisor need only exercise his authority over one other participant.

We discern no error in either the sentence or the sentencing procedure.

The judgment is affirmed. See 1st Cir. R. 27.0 (c).

By the Court:

Richard Cushing Donovan, Clerk.

**Certified and Issued as Mandate
under Fed. R. App. P. 41.**

Richard Cushing Donovan, Clerk


Deputy Clerk

Date: 4/11/07

By: MARGARET CARTER
Chief Deputy Clerk.

[cc: Neil J. Gallagher, AUSA, Sandra S. Bower, AUSA,
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